U.S. Department of Labor

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Issue Date: 29 January 2009

CASE NO.: 2006-WPC-00001

***In the Matter of*:**

JAMAL KANJ,

Complainant,

v.

VIEJAS BAND OF KUMEYAAY INDIANS,

Respondent.

Appearances: Scott A. McMillan, Esq.
For Complainant

George S. Howard, Jr., Esq.
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION & ORDER DISMISSING COMPLAINT

This case arises under the employee protection provisions of § 1367 of the Federal Water Pollution Control Act and its implementing regulations, also known as the Clean Water Act ("the Act"). *See* 33 U.S.C. § 1367; *see also* 33 U.S.C. §1252 *et seq.*; 29 CFR Part 24. On August 5, 2005, Complainant Jamal Kanj ("Complainant") filed a Complaint alleging that his employer, the Viejas Band of Kumeyaay Indians ("Respondent") terminated him from his position as the Director of Public Works and Deputy Tribal Government Manager because he reported high levels of fecal coliform in Viejas Creek to the Respondent's Tribal Council.

On September 28, 2005, the Secretary of Labor found that Respondent is sheltered by the doctrine of tribal sovereign immunity, and dismissed the complaint. On October 1, 2005, Complainant objected to the dismissal and requested a formal hearing on the matter. The case was assigned to the undersigned, who held a formal hearing in San Diego, California on August 18-21, 2008. The parties were afforded a full and fair opportunity to present evidence and arguments. Both Complainant and Respondent were represented by counsel. Administrative Law Judge Exhibits ("AX") 1-3, Complainant's Exhibits ("CX") 1-19, 21-106, 109-123, 125-127, 129-131, 136-138, 144-157, 158 (pages 1-3 only), 159, 161-164, 165 (page 1432 only), 166-171, 173-180, and A through I,

and Respondent's Exhibits 1-35 were admitted into the record.[1] The following witnesses testified at the hearing: Jamal Kanj, Edward Rose, Phillip Kaushall, Steven Jones, Don McDermott, Bobby Barrett and Wendy Roach. The parties were provided the opportunity to present post trial briefs. On November 18, 2008, Respondent filed a post trial brief. Complainant filed a post trial brief on November 21, 2008.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

FACTUAL BACKGROUND

The Respondent is a federally-recognized Indian Tribe. RX 1. On August 21, 2000, the Respondent hired the Complainant as its Director of Public Works and Deputy Tribal Government Manager. RX 1 at 6. The Complainant's duties included supervising the Public Works Department, ensuring utility services to the Reservation, communicating with the Tribal Council, maintaining a positive working relationship with the San Diego community and outside public agencies, and serving in the absence of the Tribal Government Manager. He oversaw the development, maintenance, and repair of the natural landscape and all infrastructure including waterways, waste-water treatment systems, water quality, testing, storm drains, buildings, and roads. TR at 235-236.

In the spring of 2003, the Complainant noticed an unusually high amount of fecal coliform in Viejas Creek, which runs through the Respondent's Reservation. He obtained a lab report confirming that the level of fecal coliform in the creek was in violation of the Clean Water Act and reported the results to the Tribal Council. TR 266-268; RX 3. He believed that the contaminated water in Viejas Creek directly impacted the drinking water of communities outside the Respondent's Reservation. TR at 267-268. The Complainant identified a likely source of the contamination–the livestock owned by a Tribal Elder, Tom Hyde. TR at 269. The Complainant approached Tom Hyde about fencing to keep the livestock away from the water source, but was met with insults. Thereafter, the Complainant alleges that he became the target of on-going abuse by Tom Hyde that was recognized but ignored by the Tribal Council. TR at 351-352.

By letter dated June 23, 2005, Respondent notified Complainant that his employment was terminated "without cause effective thirty days from the date of this letter." RX 22 at 64. The termination notice also requested that Complainant not be present at the Tribe's facilities unless specifically requested. Complainant acknowledged receipt of this letter at a meeting on June 23, 2005. TR at 769. By letter dated July 25, 2005, Respondent notified Complainant that his employment was terminated and forwarded Complainant funds for final pay and severance pay in accordance with his employment agreement with the Tribe. RX 23. Complainant, through his counsel, filed his Complaint on August 5, 2005 (the date the Complaint was apparently received by the Administrator, OSHA). Complainant contends that the filing date should be August 1, 2005 (presumably the date of mailing). However, this difference of 4 days has no bearing in the ultimate decision in this case, as both such dates are well beyond the 30 day time limit from the June 23, 2005 termination letter.

Ms. Roach, the Tribal Manager, testified that she decided to terminate Complainant's employment due to her belief that his performance had deteriorated particularly with respect to his handling of a construction project. She further testified that she did not have confidence in Complainant's continued "commitment" to the Tribe in view of Complainant's taking vacation at what

[1] *See* Hearing Transcript ("TR") at 12, 83, 88, 98-99, 168, 287, 649, 687, 807, 998 and 1003.

she considered a critical time and Complainant's suggestions that he was considering termination of his employment with the Tribe. TR at 911-912. Ms. Roach testified that on June 21, 2005 she received the Tribal Council's support for the termination decision, which she had made, but did not seek a formal resolution of the Tribal Council as she did not consider such a resolution to be necessary. TR at 911, 913-914.

PROCEDURAL HISTORY

On November 14, 2005, Respondent filed a motion for Summary Judgment on the ground that the doctrine of tribal sovereign immunity precludes the application of the whistleblower protection provision of the Act. On December 3, 2005, the Complainant opposed the motion by arguing that the Act explicitly abrogates tribal sovereign immunity. In a decision issued on December 19, 2005, the undersigned found that the Clean Water Act expressly and unequivocally waives the Respondent's sovereign immunity because the language of the whistleblower protection provision prohibits a person from discriminating against an employee, and the term "person" is defined within the Act as an Indian Tribe. Thereafter, Respondent sought an interlocutory appeal of the denial of Summary Judgment. On March 9, 2006, the undersigned certified the sovereign immunity issue to the Administrative Review Board ("ARB") and stayed the proceeding pending decision by the ARB. The ARB subsequently affirmed the denial of Summary Judgment in a decision issued on April 27, 2007. The case was remanded to the undersigned for hearing and the hearing was scheduled for January 22, 2008, but was subsequently continued to May 27, 2008 at the request of both parties in order to conduct discovery. The hearing was again continued and rescheduled for hearing on August 18, 2008 at the request of Complainant in order to conduct further discovery.

On January 25, 2008, Respondent filed a Notice of Motion and Motion for Leave to File a First Amended Answer requesting leave to supplement its pleadings with a Tenth Affirmative Defense asserting that some of Complainant's claims are time-barred. On March 17, 2008, the undersigned granted Respondent's Motion for Leave to File a First Amended Answer finding that since discovery in the case was placed on hold for well over a year except as to the question of tribal immunity, the filing delay by Respondent did not warrant a denial of the motion based on either delay or bad faith. On the first day of the hearing, Respondent essentially argued for summary decision on the basis that Complainant's claims were time-barred but the undersigned refused to decide this issue without hearing all of the evidence in the case. TR at 75. Respondent argued in its prehearing statement and filed a brief at the start of the hearing on the issue of timeliness of the Complaint. Complainant as well as Respondent addressed the issue of timeliness in their respective post hearing briefs.

Timely Filing of Claim

The threshold issue that must be decided is whether this Complaint was timely filed. The Act provides, in relevant part, that "[a]ny employee . . . who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within thirty days after such alleged violation occurs*, apply to the Secretary of Labor for a review of such firing or alleged discrimination." 33 U.S.C. § 1367(b) (emphasis added). In whistleblower cases, statutes of limitation, such as § 1367(b), run from the date an employee receives "final, definitive, and unequivocal notice" of a discharge or other discriminatory act. *See Corbett v. Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65 (ARB Dec. 31, 2008); *Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003). The date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks

the occurrence of a violation, rather than the date the employee experiences the consequences. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3-4 (ARB Aug. 31, 2005); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See also Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks,* 449 U.S. 250, 258 (1980) (limitations period begins to run when the decision to deny tenure is made and communicated rather than on the date employment termination is effective).

Thus, under the line of cases cited above, June 23, 2005, the date of unequivocal notice of discharge, and not July 25, 2005, the date the discharge took effect, was the date the 30-day limitations period began to run. Because Complainant did not file his complaint with OSHA until more than 30 days later, August 5 (or 1), 2005, his complaint was untimely. Complainant argues that the June 23, 2005 notice of discharge was not unequivocal since he had "hope" that the decision to terminate would be reversed since the notice indicated that he should not be present at the Tribe's facilities unless "specifically requested." Where final written unequivocal termination notice is given, a subjective belief on Complainant's part that termination may not become effective does not alter the triggering date of the filing period. *English v. Whitfield*, 858 F.2d 957, 961-962 (4th Cir. 1988); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 947 (6th Cir. 1987). I find that Complainant's "hope" based on the possibility that he might be asked to perform some work at the Tribe's facilities during the notice period prior to his actual termination forms no rational basis for any realistic assumption that his June 23, 2005 termination notice was anything other than just what it was, a notice of his termination.

Complainant further contends that his termination should have been voted on by the Tribal Council and memorialized in a resolution such that he considered the termination subject to revocation by the Tribal Council until he received the letter of July 25, 2005, citing *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991). In *Hoesterey*, a case for wrongful termination brought pursuant to the due process provision of 43 U.S.C. §1983, the complainant alleged that he involuntarily resigned due to hostile workplace conditions. His resignation was tendered on November 28, 1986, with an effective date of November 30, 1986. Hoesterey filed his action on November 30, 1987. In distinguishing the *Ricks/Chardon* rationale, the Ninth Circuit court noted that Hoesterey was challenging the failure of the Employer to hold a pretermination hearing and not the actual decision to terminate employment. *Hoesterey,* 945 F.2d at 320. Thus, the court held that the one year limitations period in that case ran from the actual last date of employment since that was the date on which he definitively knew that he was not receiving the pretermination procedures of which he was complaining. *Id at 320*.

The facts in the present case are vastly different from those in *Hoesterey*. First, this is a complaint of retaliatory discharge, not a due process claim aimed at failure to follow pretermination procedures set forth by law, as in *Hoesterey*. Thus, the date of notification of termination, June 23, 2005, is the appropriate date on which the time limitation should run since Kanj's claim is in fact a claim for wrongful termination, not violation of due process by failing to follow legal requirements in the termination procedure. Kanj was terminated on written notice by Respondent, not "constructively terminated" as was Hoesterey. Further, despite Complainant's current claim that there should be a formal resolution by the Tribal Council in order to terminate his employment, there is no evidence that Kanj ever requested such a formalization of his termination. Thus, unlike Hoesterey who "repeatedly requested that Smith provide him the written notification of termination required for City employees to appeal a termination decision," Kanj never requested any such action from Respondent. *Id.* at 320. There is no evidence in the record or citation made to any legal requirement that the Tribal Council

pass a formal resolution for termination of Complainant's employment. Indeed, had Kanj requested such formalization of his termination by way of a Tribal Council resolution, presumably such a resolution could have been provided since Roach testified that the Tribal Council had in fact approved her termination decision. TR at 914.

Complainant has argued that there were continuing violations by Respondent including delays in raises, failure to approve requested vacation time, delays in promotions and false accusations. However, all of these purported actions took place prior to the last discrete act of retaliation alleged, Complainant's termination from employment. Each discrete adverse employment act triggers the time limitation. *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 113 (2002). As Complainant has presented no evidence of any adverse act by Respondent following his termination letter dated June 23, 2005, there is no basis for excusal of the 30 day time limit for filing his complaint from the date of his termination notice.

Although not specifically argued by Complainant, I have considered whether equitable estoppel or equitable tolling should be applied to his complaint in order to render it timely filed. Courts have held that the time limitation provisions under the Act are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather it is analogous to statutes of limitation and thus may be tolled by equitable consideration. *Donovan v. Hanker, Forman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981). The *Allentown* court warns, however, that the restrictions of equitable consideration must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may otherwise be a meritorious case. *See Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991). The burden is on the party seeking the benefit of equitable tolling to establish such tolling is warranted. *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004).

There are two tolling doctrines that will, for equity purposes, stop the statute of limitations from running. These tolling doctrines have been applied in situations: (1) where the complainant has been actively misled by the respondent regarding the cause of action; (2) has been prevented in some extraordinary way from asserting his or her rights; or (3) has previously raised the exact claim which by mistake was raised in an incorrect forum. *McGough v. United States Navy*, 2 OAA 3, 213, 86 ERA-18-20 (Decision and Order of Remand by the Secretary of Labor, June 30, 1988); *Gass v. Lockheed Martin Energy Systems*, 2000-CAA-22 (ALJ Apr. 29, 2003).

The first tolling doctrine, *equitable estoppel*, focuses on whether the employer misled the complainant, thereby causing a delay in filing the complaint. The cases that have applied equitable estoppel have been cases in which the employer was found to have misled the employee into believing he or she has no cause of action. For example, in *McConnell v. General Telephone Co.*, 814 F.2d 1311 (9th Cir. 1987), *cert. denied sub nom. General Telephone Co. v. Addy*, 484 U.S. 1059, 108 S. Ct. 1013 (1988), the employer misled the employee into believing he had been temporarily laid off rather than terminated. Similarly, in *Charles A. Kent*, 1984-WPC-2, 1 O.A.A. 2, at 442 (Remand Decision and Order of Secretary of Labor, April 6, 1987), and *Reeb v. Economic Opportunity Atlanta Inc.*, 516 F.2d 924 (5th Cir. 1975), the employees were misled by the employers into believing they had not been terminated. In all of these cases, since the employees were misled into believing that no adverse action had been taken against them, they could not have been aware that a cause of action existed.

Nothing in the evidence submitted by the parties leads me to conclude that equitable estoppel should be applied in this case. Respondent did not wrongfully conceal any of its actions. Complainant was informed in very clear terms that his position would be terminated on June 23, 2005, and Respondent did nothing to mislead Kanj regarding his termination. As the court in *Scott v. Alyeska* notes, it cannot be reasonably expected of an employer to communicate a possible discriminatory motive for termination directly to the aggrieved employee. The fact that Respondent may have possibly concealed its motive for terminating Kanj has no bearing on the fact that Complainant understood that he was unequivocally terminated on June 23, 2005. Equitable estoppel focuses on the actions, rather than the motives, of the employer. Therefore, I find that equitable estoppel cannot be applied in this case.

The second doctrine, *equitable tolling*, focuses on whether a complainant was excusably ignorant of his or her rights due to an extraordinary circumstance or, alternatively, when a complainant files a timely complaint raising issues sufficient to state a cause of action under environmental whistleblowing laws, but files the complaint in the wrong forum. *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, 95-CAA-15 (ARB Nov. 27, 1996); *Biddel v. Department of the Army*, 93-WPC-9 (ALJ July 20, 1993). The equitable tolling doctrines, however, do not permit disregard of the limitation periods simply because they bar what may be an otherwise meritorious cause. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

The doctrine of *equitable tolling* allows a complainant to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the issue of his claim. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). Courts have considered five separate factors in determining whether equitable tolling is appropriate in a given case: (1) whether the plaintiff lacked actual notice of the filing requirements; (2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights. Ignorance of the law alone is not sufficient to warrant equitable tolling. *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (*per curiam*). The complainant must make a particularly strong showing that some extraordinary fact prevented him from timely filing. Extraordinary circumstances have included mental illness, attorney abandonment, and death of the complainant. *Ricketts v. Northeast Utilities Corp.*, 1998-ERA-30 (ALJ Oct. 29, 1998); *Hall v. EG&G Defense Materials, Inc.*, 1997-SDW-9 (ARB Sept. 30, 1998).

In this case, there is no basis for a claim of equitable tolling as Complainant was represented by counsel at all pertinent times and was clearly aware of his potential claim as demonstrated by his counsel's letter in early June, 2005 (several weeks prior to the June 23, 2005 termination letter) relating Complainant's complaints of abusive treatment for his whistleblowing activities. TR at 964-965; CX 41. Consultation with counsel precludes application of equitable tolling considerations. *Kent v. Barton Protective Service*, 1984-WPC-1 (Sec'y Sept 28, 1990), *af'fd*. 946 F.2d 904 (11th Cir. 1991); *Hay v. Wells Cargo, Inc.*, 596 F.Supp. 635, 640 (D.Nev. 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986). *See also: Kale v. Combined Insurance Co. of America*, 861 F.2d 746, 753 (1st Cir. 1988). Therefore, complainant knew, or he should have known, of a possible discriminatory motive for his termination well within the statutory limitations. The discrimination actions should have triggered Complainant to file his claim in a timely matter. Based on the evidence as summarized above, I find that none of the three situations that may warrant a tolling of the statute of limitations is applicable in this case. As a result, Kanj's complaint is dismissed because it was untimely filed under WPCA. The issue of whether Respondent took adverse employment action against the complainant due to his protected activity is moot and will not be considered.

ORDER

For the above-stated reasons, **IT IS HEREBY ORDERED** that the Complaint filed by Jamal Kanj is dismissed.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS:

This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).